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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1919

No. [redacted]202

MICHAEL MAGUIRE and C. S. MAGUIRE,
Plaintiffs in Error,

vs.

TIMOTHY A. REARDON et al., as Commissioners, Constituting the Board of Public Works of the City and County of San Francisco et al.,
Defendants in Error.

In Error to the District Court of Appeal of the State of California in and for the First Appellate District, Division One.

BRIEF FOR DEFENDANTS IN ERROR.

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In the Supreme Court
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OCTOBER TERM, 1919

No. 607

MICHAEL MAGUIRE and C. S. MAGUIRE,
Plaintiffs in Error,

vs.

TIMOTHY A. REARDON et al., as Commissioners, Constituting the Board of Public Works of the City and County of San Francisco et al.,
Defendants in Error.

In Error to the District Court of Appeal of the State of California in and for the First Appellate District, Division One.

BRIEF FOR DEFENDANTS IN ERROR.

Defendants in error are the members of the Board of Public Works and Chief Building Inspector of the City and County of San Francisco, and the City and County of San Francisco. Plaintiffs in error are the owners of a wooden building which was

built and is being maintained within the fire limits of the City and County of San Francisco as established by a certain Ordinance No. 1198 of the said city and county prior to the date of the erection of said wooden building. Under authority vested in them by a certain Ordinance No. 5140 (New Series), the Board of Public Works were proceeding to demolish said building when this action was commenced in the Superior Court of the State to enjoin and prevent its demolition. Judgment went for defendants in error in the Superior Court, and this judgment was affirmed by the California District Court of Appeal, First Appellate District, Division One. The State Supreme Court denied a rehearing. The case comes to this Court on writ of error to the State Court.

The wooden building here in question was constructed shortly after the great fire and earthquake which laid such a large part of San Francisco in ruins in April, 1906. Hardly a building was left standing within the fire limits, and the necessity for some immediate and drastic step to afford temporary relief was too obvious to need comment here. What was done by the officials of San Francisco in this emergency may best be told in the language of the Supreme Court of the State of California in the case of Howell v. City of Hamburg Co., 165 Cal. 172, at pp. 175-6:

> "In the face of the great necessity for temporary buildings in San Francisco immediately following the conflagration of April 18, 19 and

20, 1906, the municipal authorities of the city and county unofficially announced that the construction of temporary wooden frame buildings within said fire limits would be permitted until July 1, 1906, but that all said buildings would be subject to removal at the pleasure of the authorities. * * *

The charter of the city and county of San Francisco authorizes the board of supervisors to fix the limits within which wooden buildings or structures shall not be erected or maintained, and provides that 'such limits when once established shall not be changed except by extension'. (Charter, chap. II, sec. 5.) So that it would seem that the supervisors would have had no authority after the fire, even by ordinance, to permit the erection of any wooden building within the limits previously defined as the fire limits, the charter provision limiting their powers in this behalf. But they did not even purport to so do by ordinance, which even if there were no charter provisions would be essential to any change in existing ordinances on the subject. All that there was in this case in effect was the unofficial announcement of the municipal authorities that they would regard the law on the subject suspended for the time being and would not attempt to enforce it, which was followed by the actual failure on the part of such authorities to enforce the same. The good faith both of the authorities and those erecting wooden buildings under the assurance thus given is not to be questioned in the slightest degree. It may freely be conceded that the emergency was such as to morally justify the authorities and those acting upon their assurances in doing as they did. But of course the law could not be changed in any such way. The ordinances on the subject continued in force unaffected by the unofficial announcement in the slightest degree, with the result that the con-

> struction of this building on this lot, which was expressly provided for in the lease, was 'contrary to an express provision of law,' and therefore 'not lawful' (Civ. Code, sec. 1667), on May 17, 1906, and at all times thenceforth."

It is clear that the few wooden buildings which still remain from this period have long outlived the "moral justification" spoken of in the quoted portion of the opinion.

I.

THE STATE COURT HAS SETTLED THE CONSTRUCTION OF THE ORDINANCES AND CHARTER PROVISION INVOLVED HEREIN. THIS COURT ON WRIT OF ERROR TO THE STATE COURT WILL NOT REVIEW THE CONSTRUCTION OF STATE LAWS BY THE STATE COURT.

The Charter of the City and County of San Francisco provides in subdivision 5 of section 1, Chapter II, Article II, as follows:

> "Section 1. Subject to the provisions, limitations and restrictions in this Charter contained, the Board of Supervisors shall have power * * *
>
> 5. To fix limits within which wooden buildings or structures shall not be erected, placed, or maintained, and to prohibit the same within such limits. Such limits when once established shall not be changed except by extension."

Ordinance No. 1198 provides in section 1 thereof that

> "The fire limits shall be bounded by a line commencing * * *" (followed by a description of metes and bounds).

A large part of the brief of plaintiffs in error is taken up with an attempt to show that Ordinance No. 1198 which described certain "Fire Limits", within which the wooden building in question was situated, did not have the effect of prohibiting the construction of wooden buildings within such fire limits. The State Court held specifically that this Ordinance No. 1198, taken in connection with subdivision 5 of section 1, Chapter II, Article II of the Charter of the City and County of San Francisco, did have the effect of prohibiting the construction of wooden buildings within the fire limits. The District Court of Appeal, citing Bancroft v. Goldberg, Bowen & Co., 16 Cal. App. Dec. 37, and the same case on rehearing in 166 Cal. 416, held that

> "the effect of the ordinance and the charter provisions is to make the erection or maintenance of a wooden building within the fire limits, as defined in the ordinance, unlawful". (Tr. of Record p. 34.)

The jurisdiction of this Court on writ of error to a State Court is limited to the consideration of certain Federal questions. (Section 237, Judicial Code.) The construction of State legislation is a local, not a Federal, question, and the decision of the State Court thereon is not subject to review by this Court on writ of error to the State Court.

> Missouri v. Dockery, 191 U. S. 165, 48 L. Ed. 133;

Lombard v. West Chicago Park Commrs., 181 U. S. 33, 45 L. Ed. 731;
Marshall v. Ladd, 19 L. Ed. 153;
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Martin v. West, 222 U. S. 191, 56 L. Ed. 159;
Smiley v. Kansas, 196 U. S. 447, 49 L. Ed. 546;
The Winnebago, 205 U. S. 354, 51 L. Ed. 836;
Gatewood v. North Carolina, 203 U. S. 531, 51 L. Ed. 305;
Clement National Bank v. Vermont, 231 U. S. 120, 58 L. Ed. 147;
Fischer v. St. Louis, 194 U. S. 361, 48 L. Ed. 1018;
Danciger v. Cooley, 248 U. S. 319, 63 L. Ed. 266;
Price v. Illinois, 238 U. S. 446, 59 L. Ed. 1400;
Morley v. Lake Shore etc. R. Co., 146 U. S. 162, 36 L. Ed. 925;
Osborne v. Florida, 164 U. S. 650, 41 L. Ed. 586.

It follows that this Court will accept the construction placed upon this ordinance and Charter provision by the State Court. As so construed, it did prohibit the erection of the building here in question.

A large part of the argument of plaintiffs in error is taken up with the question whether Ordinance No. 1198 is sufficiently definite in its terms. The State Court has held that it is. This Court said in Osborne v. Florida, cited *supra:*

> "The second ground for holding the statute void is that it is not sufficiently determinate, definite, and certain in its character upon which to ascertain the amount to be paid for licenses. This ground furnishes no reason for interference by this court. Whether the statute be sufficiently determinate or certain in its character upon which to ascertain the amount to be paid for a license is a question of the construction of the state statute which does not necessarily involve a Federal question, and the determination of the state court as to the proper construction and sufficiency of such a statute is conclusive upon us."
>
> 164 U. S. 656, 41 L. Ed. 588.

Counsel for plaintiffs in error also relies largely upon the contention that the Charter provision in question is not self-executing, and cites in support of his contention several previous California decisions construing other statutes and constitutional provisions. But on this question the conclusion of the State Court in the case under review is likewise controlling, even though it be (which we do not concede) inconsistent with the reasoning of prior decisions, or with what this Court may consider proper rules of statutory construction.

This Court disposed of a similar argument in Lombard v. West Chicago Park Commrs., cited *supra*, in the following language:

> "The theory lying at the foundation of all the arguments advanced to show that the court below committed error of a Federal nature is this, and nothing more, that the equal protection of the laws was denied by the Supreme Court of Illinois, because that Court, although

> it treated the assessing ordinance as invalid for the purposes of the first assessment, upheld that ordinance as valid for the second assessment. This but asserts that, because it is considered that there was inconsistency in the reasoning by which the Supreme Court of Illinois sustained its conclusion, therefore the equal protection of the laws are denied. If the proposition as thus understood was held to be sound, as it cannot be, every case decided in the courts of last resort of the several states would be subject to the revisory power of this court, wherever the losing party deemed that the reasoning by which the state court had been led to decide adversely to his rights was inconsistent with the reasoning previously announced by the same court in former cases."
>
> 181 U. S. 44-45, 45 L. Ed. 738.

Plaintiffs in error also urge that under the Charter of San Francisco the power to demolish the building in question could not be conferred on the Board of Public Works. The State Court decided otherwise (Tr. of Record p. 36) and under the authorities above cited that decision is likewise controlling upon this Court.

II.

THE DECISION OF THE STATE COURT THAT ORDINANCE NO. 1198 TAKEN IN CONNECTION WITH THE CHARTER PROVISION HAD THE EFFECT OF PROHIBITING THE CONSTRUCTION OF WOODEN BUILDINGS WITHIN THE FIRE LIMITS IS IN ANY EVENT CORRECT.

While we are satisfied that this Court will not review the construction placed upon Ordinance

No. 1198 by the State Court, nevertheless, counsel for plaintiffs in error have devoted so much of their brief to the question of the proper construction of this ordinance that we may be pardoned for briefly stating the reasons why in our opinion the decision of the State Court upon this question was correct.

A. Ordinance No. 1198 must prohibit the construction of wooden buildings or it is a nullity. But it is a settled rule of statutory construction that statutes must be given effect if possible.

It is a settled rule of statutory construction which has been incorporated in our California Civil Code that

> "An interpretation which gives effect is preferred to one which makes void".
>
> Civil Code, sec. 3541.

> "It is a cardinal rule that all statutes are to be so construed as to sustain rather than ignore or defeat them; to give them operation, if the language will permit, instead of treating them as meaningless: *ut res magis valeat, quam pereat.*"
>
> Lewis' Sutherland on Statutory Construction, 2nd Ed., Vol. II, p. 927, sec. 498.

The Court said in construing a statute in Kaiser etc. Co. v. Curry, 155 Cal. 638, 647:

> "Any other construction would render the act absolutely worthless, so far as its practical effect is concerned, and certainly we are not to attribute to the legislature an intention to bring about such a result, unless that intention is plain."

In Warren County v. Nall, 29 So. 735, the Court was asked to construe a statute in such a manner as to render it absolutely ineffective. In refusing to do so the Court said at page 737:

> "We must sustain the grant here involved, or we must adjudge that the legislature of the state in 1852 enacted a solemn farce. • • • It is equally as serious a matter for a court to adjudge an act of the legislature void on the assertion that, or because, its terms are so contradictory as to destroy it and deprive it of all meaning and effect. It should not be done if there be any reasonable way to escape from so doing."

To the same effect see:

Black on Interpretation of Laws, 2nd Ed., p. 132;

Hilburn v. St. Paul etc. Co., 58 Pac. 551, 554;

State v. Duis, 116 N. W. 751, 752;

Slocum v. Neptune, 53 Atl. 301, 302;

Hettel v. First Judicial Court, 96 Pac. 1062, 1064;

State v. Martin, 103 Pac. 840, 842;

The Emily and The Carolina, 6 L. Ed. 116.

Unless Ordinance No. 1198 is construed as prohibiting the erection of wooden buildings within the fire limits it must be construed as accomplishing absolutely nothing and the Court must determine, in the language of Warren County v. Nall, *supra*, that the Board of Supervisors in adopting it "enacted a solemn farce".

B. The term "fire limits" has come to have a well-settled meaning. It means a district within which the erection of wooden buildings is prohibited.

In Dillon on Municipal Corporations, 5th Ed., Vol. II, sec. 727, pp. 1103-4, the learned author says:

> "Municipal corporations, with general power to provide for the safety of their inhabitants * * * may * * * establish *fire limits*, and prevent the erection therein of *wooden buildings.*" (Italics ours.)

McQuillin in his work on Municipal Corporations, Vol. III, sec. 948, p. 2061, says:

> "Under the powers usually conferred, municipal corporations may prescribe *fire limits* and forbid the erection therein of *wooden structures.*" (Italics ours.)

In Freund on Police Power we likewise find:

> "On the other hand so far-reaching a limitation by municipal ordinance as the establishment of *fire limits within which wooden buildings may not be erected, has been upheld.* * * *"
>
> Freund, Police Power, sec. 33, p. 29.
>
> "Cities may, according to the predominant judicial opinion, establish *fire limits, within which the erection of frame houses is prohibited*" (Italics ours.)
>
> Id., sec. 141 p. 131.

So in a note in 9 Ann. Cas., 292, the author of the note says:

> "It is generally held that a municipal corporation which * * * has prohibited the

> *erection of wooden buildings* within a certain district, usually known as the *fire limits,* may, etc." (Italics ours.)

And in the Am. & Eng. Enc. of Law, 2nd Ed., Vol. XIII, at pp. 396 et seq., will be found an article entitled, "Fire Limits". This article is devoted exclusively to the single subject of the effect of ordinances prohibiting the construction of wooden buildings.

We thus see that the term "fire limits" is used consistently with a single meaning, to wit: the limits within which frame or wooden buildings may not be erected or maintained.

But "frame" and "wooden" are synonymous when applied to a building.

19 Cyc., p. 1450;
Olmstead v. Pac., 91 P. 113;
Ward v. Murphysboro, 77 Ill. App. 549.

So when the board of supervisors adopted the ordinance defining the fire limits it was exercising its power to fix the limits within which wooden buildings or structures shall not be erected, placed or maintained.

C. In the printed Charter subdivision 5, section 1, Chapter II, Article II, is designated by a marginal note "Fire Limits". Ordinance No. 1198 must be presumed to have been enacted with reference to this fact.

In the printed Charter of the City and County of San Francisco as adopted by the freeholders and approved by the legislature the district within which no wooden buildings may be erected, placed

or maintained as provided for in subdivision 5, section 1, Chapter II, Article II, is designated in a marginal note as "Fire Limits" (Statutes of California, 1899, p. 249). This is further evidence of the fact that the term "fire limits" has a well recognized meaning as stated hereinabove. In addition to this it must be presumed that the Board of Supervisors in adopting Ordinance No. 1198 were familiar with this Charter provision and its marginal note and used the term in the same sense in which that term was used in the marginal note to subdivision 5, section 1, Chapter II, Article II of the Charter.

III.

EVERY PRESUMPTION IS INDULGED IN FAVOR OF THE CONSTITUTIONALITY OF A STATE LAW AND THIS COURT WILL RESOLVE EVERY DOUBT IN FAVOR OF ITS CONSTITUTIONALITY.

In considering the constitutional questions raised by plaintiffs in error it must be borne in mind that every doubt is to be resolved in favor of the constitutionality of the ordinances attacked.

Holden v. Hardy, 169 U. S. 366, 42 L. Ed. 780.

And that this is especially true in a case where this Court is reviewing the decision of a State Court upholding them.

Welch v. Swasey, 214 U. S. 91, 53 L. Ed. 923;
Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 54 L. Ed. 515.

IV.

SAID ORDINANCES ARE NOT UNREASONABLY DISCRIMINATORY.

A. The rules for testing the contention of a denial of equal protection of the laws.

This Court in Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78-9, 55 L. Ed. 369, 377, enunciated the following rules for testing a claim of unconstitutional discrimination:

> "The rules by which this contention (denial of the equal protection of the laws) must be tested, as is shown by repeated decisions of this court, are these: 1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest on any reasonable basis but is essentially arbitrary. (Citing cases.)"

B. Tested by these rules, the ordinances attacked are not shown to be unreasonably discriminatory.

1. The claim that the ordinances are discriminatory by reason of the fact that they do not prohibit the construction of buildings of other inflammable materials than wood is without foundation.

Plaintiffs in error have not sustained the burden of showing that the prohibition of wooden buildings without prohibiting buildings of other inflammable materials does not rest on a reasonable basis.

It is not alleged in the complaint nor found by the Court that buildings are commonly or at all constructed of paper, canvas or other inflammable materials in San Francisco or that there is within the fire limits any building constructed of any other such inflammable material. Nor is it alleged or proved that if buildings were built of paper or canvas they would be as inflammable as buildings of wood.

But apart from that, similar ordinances have been held valid in many jurisdictions.

In the following cases ordinances prohibiting "wooden buildings" within fire limits, and not referring to buildings of other inflammable material were held valid:

Canepa v. Mayor, 9 So. 180;
Kaufman v. Stein, 37 N. E. 333;
Hubbard v. Medford, 25 P. 640;
Olympia v. Mann, 25 P. 337;
Hine v. New Haven, 40 Conn. 478;

Salem v. Maynes, 123 Mass. 372;
Alexander v. Greenville, 54 Miss. 659;
Respublica v. Dugnet, 2 Yeates (Pa.) 493;
Baumgartner v. Hasty, 100 Ind. 575;
Wadleigh v. Gilman, 12 Me. 403;
Eichenlaub v. St. Joseph, 21 S. W. 8.

These regulations extending over many jurisdictions and taking in a wide period of time indicate a general and settled view throughout the United States that wooden buildings belong to a class which may properly be singled out for regulation. In this connection it should also be noticed that no one, so far as we have been able to ascertain, has ever before claimed that such an ordinance is unreasonably discriminatory because limited to wooden buildings. Such a widespread and general opinion is not to be disregarded in testing the constitutionality of the ordinances in question and this Court will not declare ordinances unconstitutional when the legislative conclusion has the support of public opinion or common belief.

Laurel Hill Cemetery v. San Francisco, 216 U. S. 356, 54 L. Ed. 515;
Jacobson v. Massachusetts, 197 U. S. 11, 49 L. Ed. 643;
Otis v. Parker, 187 U. S. 606, 47 L. Ed. 323.

In addition to this, police legislation is properly directed at existing or threatened evils, and, as we have pointed out, it is not alleged or found that even one building has ever been constructed in San

Francisco of inflammable materials other than wood. When the time arrives, if it ever does, that other inflammable materials are used or threatened to be used for the construction of buildings it will be time enough to legislate concerning them.

2. The claim of unreasonable discrimination by reason of the fact that the City and County of San Francisco is maintaining certain wooden buildings within the fire limits is not tenable.

a. *The State is not bound by general language in a statute.*

It is a settled rule of statutory construction that the sovereign government is not bound by general language in a statute.

Dollar Savings Bank v. U. S., 19 Wall. 227, 22 L. Ed. 80;

U. S. v. Herron, 20 Wall. 251, 22 L. Ed. 275;

U. S. v. North Carolina, 136 U. S. 211, 34 L. Ed. 336;

Guarantee etc. Co. v. Title etc. Co., 224 U. S. 151, 56 L. Ed. 706;

Milwaukee v. McGregor, 121 N. W. 642 (Wis.);

Goss v. Greenleaf, 57 Atl. 581 (Me.);

State v. Baker, 64 So. 993 (La).

This rule is well settled in California.

Molineux v. California, 109 Cal. 378;

Maythofer v. Board, 89 Cal. 110;

Savings etc. Society v. San Francisco, 131 Cal. 356;

Whitaker v. County of Tuolumne, 96 Cal. 100;
Berton v. All Persons, 176 Cal. 610.

It follows that the general prohibition against the construction of wooden buildings within the fire limits does not extend to the City and County of San Francisco, at least in its governmental capacity.

b. *The distinction between the governmental and proprietary functions of a municipality is well recognized. Acting in a proprietary capacity, the City and County of San Francisco might be bound by the fire limits ordinances, but not in its governmental capacity.*

The wooden buildings maintained by the City and County of San Francisco within the fire limits are two fire houses, two wooden buildings used as school rooms and one police station. (Tr. of Record p. 22.) In maintaining these buildings for these purposes, the City and County of San Francisco is clearly acting in its governmental capacity.

The distinction between the governmental and proprietary capacities of a municipality is well recognized.

Vilas v. Manila, 220 U. S. 345, 55 L. Ed. 491;
South Carolina v. U. S. 199 U. S. 437, 50 L. Ed. 261.

In its proprietary capacity it is treated much as any other corporation, but this is not true when it is acting in its governmental capacity. A compari-

son of the two cases cited below readily indicates the distinction.

New Orleans Gas Co. v. Drainage Comm., 197 U. S. 453, 49 L. Ed. 831;

Los Angeles v. Los Angeles Gas Corp., 251 U. S. 32.

A classification which puts the state and its governmental subdivisions while acting in their governmental capacity in one class and all private parties in another is certainly founded on a reasonable basis of distinction. How can it be said that plaintiffs in error are unreasonably discriminated against by such a classification? They cannot be held to be injuriously affected because they are not engaged in the business of maintaining public schools, fire houses or police stations. If the city was maintaining wooden buildings for stores in competition with them they might then be heard to complain.

The furnishing of police and fire protection and the means of education to its citizens are among the most important functions of government. Certainly if the legislative body finds in its discretion that it is of greater importance to exercise these governmental functions unhampered than to apply the provisions of the fire limits ordinance to itself, that determination will not be held by the Courts not to be based upon reasonable grounds.

Besides there is no showing upon the part of plaintiffs in error that the City and County of San Francisco has not located these buildings in such

a situation that they do not constitute a fire risk of any gravity, or that in their management they do not take precautions against fire risks which could not readily or efficaciously be imposed upon private individuals.

Plaintiffs in error complain that the city and county might in the conduct of its municipal railroad erect wooden car barns within the fire limits and prevent competing street railroads from doing the same. A complete answer to this claim is that the City and County of San Francisco has not done this.

In maintaining car barns it would be acting in a proprietary capacity and we may concede that while so acting it would be bound by the fire limits ordinance or lay itself open to a claim of unconstitutional discrimination. But until it seeks to do this that question cannot arise.

V.

ORDINANCE NO. 4170 (New Series) DOES NOT DEPRIVE OF VESTED OR ANY RIGHTS.

Plaintiffs in error having erected a wooden building in the fire limits in violation of law can have no vested rights therein.

> "There can be no acquisition of a right by the performance of an illegal act. In removing a building erected in violation of law * * * no private right is invaded, because none could grow out of the illegal act."
>
> Baumgartner v. Hasty, 100 Ind. 575.

In a somewhat similar case in New York the Court said of the owner of a wooden building within fire limits:

> "The counsel for respondent claims that his client, by reason of the consents obtained and the lapse of time, has vested rights. The difficulty is that he never had any rights to vest."
>
> Brooklyn v. Furey, 30 N. Y. S. 349.

> "Where the law prohibits the creation or acquisition of certain property, and thereafter in manifest contravention to it such property is created or acquired, it is perhaps not strictly speaking a nuisance *per se*, since it is not imminently dangerous, but it is evidently less entitled to consideration that property which is merely unlawfully used, since the status of the whole property is illegal *ab initio*. It has thus been held that a frame building erected in violation of law may be torn down summarily, preserving the material to the owner."
>
> Freund, The Police Power, p. 560, sec. 528.

Appellants' building being illegal *ab initio*, they could acquire no vested right therein.

VI.

SAID ORDINANCE IS NOT UNCONSTITUTIONAL AS IMPAIRING THE OBLIGATION OF CONTRACT.

The officers of the city could no more expressly or impliedly legally contract for the erection of a wooden building within the fire limits than could private individuals. Any such contract would be illegal and a nullity.

In Howell v. City of Hamburg, 165 Cal. 172, the Court said:

> "The Charter of the City and County of San Francisco authorizes the board of supervisors to fix the limits within which wooden buildings or structures shall not be erected or maintained, and provides that 'such limits when once established shall not be changed except by extension'. (Citing the Charter.) So that it would seem that the supervisors would have had no authority after the fire, even by ordinance, to permit the erection of any wooden building within the limits previously defined as the fire limits, the charter limiting their power in that behalf."

How can it be claimed then that any officers of the city could expressly or impliedly contract to permit this illegal building to be maintained?

It is likewise clear that any contracts entered into with tenants were made with knowledge that the building was illegal, and subject to the right of the city to remove it.

VII.

SAID ORDINANCE IS NOT RETROACTIVE.

The building here in question was erected in violation of law (Ordinance No. 1198) and has ever since been illegally maintained. It has always been forbidden by law. Ordinance No. 4170 (New Series) does not declare it unlawful for the first time. It simply provides a means of abating what was illegal *ab initio*. It does not make a building, lawful when erected, unlawful. It provides for the

demolition of buildings already unlawfully erected and maintained.

Plaintiffs in error also claim that the ordinance is unconstitutional as prohibiting the maintenance of wooden buildings lawful when erected. We do not so construe it. In any event, as said in Bancroft v. Goldberg, Bowen & Co., 16 Cal. App. Dec. 37:

> "It is not claimed that the ordinance would have a retroactive effect so as to make the maintaining of wooden buildings erected before its passage unlawful; but that question is not involved here, for the building under lease in this action was erected after the passage of the ordinance defining the fire limits".

This building was erected in violation of Ordinance No. 1198 after the fire limits were established. Plaintiffs in error cannot complain because the owner of a wooden building erected before the fire limits were established might be unconstitutionally affected. In order to attack the constitutionality of an ordinance they must show that it is unconstitutional as to them.

> "We may once more repeat what has been so often said, that one who would strike down a state statute as violative of the Federal Constitution must show he is within the class with respect to whom the act is unconstitutional, and must show that the alleged unconstitutional feature injures him, and so operates as to deprive him of rights protected by the Federal Constitution."
>
> Plymouth Coal Co. v. Pennsylvania, 58 L. Ed. 713, 719, 232 U. S. 531, 544-5.

See also:

Laurel Hill Cem. v. San Francisco, 216 U. S. 358, 54 L. Ed. 515;

In re O'Brien, 75 Pac. 196, 198;

Farnum v. Cemetery Assn., 35 N. E. 271;

Standard etc. Co. v. Wright, 225 U. S. 623, 56 L. Ed. 1229;

Aluminum Co. v. Ramsey, 222 U. S. 251, 56 L. Ed. 185;

Castillo v. McConnico, 168 U. S. 674, 42 L. Ed. 622, 625.

VIII.

THE ORDINANCE IS NOT UNREASONABLE.

The ordinance applies to "any wooden building or structure of any kind whatsoever".

Counsel claims that the adjective "wooden" does not modify "structure". Clearly it does. The ordinance applies to wooden buildings and wooden structures. The Court will, of course, construe it reasonably.

Counsel are needlessly alarmed over the fact that wooden chairs, desks, etc., being structures, as they claim, are made illegal by this ordinance. Under the rule *ejusdem generis* "structure" must be construed as of the same general character as a building. So construed, the ordinance is clearly reasonable.

IX.

THE ORDINANCE DOES NOT DESTROY PROPERTY WITHOUT DUE PROCESS OF LAW.

The building here in question, as we have already pointed out, was erected in the fire limits and was illegal *ab initio*. A wooden building erected in violation of a fire limits ordinance may be summarily destroyed without any judicial proceedings.

It is the general rule that when property is imminently dangerous it may be summarily destroyed without notice or hearing, and that the owner's remedy is by an action for damages after the destruction, if in fact the destruction was not justified. A good example of this rule is found in

> North American etc. Co. v. Chicago, 211 U. S. 306, 53 L. Ed. 195.

In that case this Court had under consideration an ordinance of the City of Chicago providing for the summary destruction of food in cold storage which was unfit for human consumption. The Court said:

> "We are of opinion, however, that provision for a hearing before seizure and condemnation and destruction of food which is unwholesome and unfit for use is not necessary. The right to so seize is based upon the right and duty of the state to protect and guard, as far as possible, the lives and health of its inhabitants, and that it is proper to provide that food which is unfit for human consumption should be summarily seized and destroyed to prevent the danger which would arise from eating it. The right to so seize and destroy is, of course, based upon

> the fact that the food is not fit to be eaten. Food that is in such a condition, if kept for sale or in danger of being sold, is in itself a nuisance and a nuisance of the most dangerous kind, involving, as it does, the health, if not the lives, of the persons who eat it."

The same principle has been applied wherever the question of the summary destruction of wooden buildings within fire limits has been presented to the courts. A wooden building within the fire limits is imminently dangerous in the same way that unwholesome food is imminently dangerous, and so it may be summarily destroyed.

In 13 American & English Encyclopedia of Law at page 400 it is said:

> "Where a municipal corporation has power to prohibit the construction of wooden buildings within a district and has enacted an ordinance to that effect, it may remove any building erected in violation of the ordinance, and this, too, without any judicial proceedings whatever." (Citing many cases.)

In

Miller v. Sergeant, 37 N. E. 418,

the Court of Appeals of Indiana said of the power to destroy wooden buildings within fire limits:

> "Such power may often be exercised in a summary manner. Every community has the right of self-preservation. When a public nuisance creates an imminent danger, a necessity for immediate action arises. If the public authorities were compelled to give notice and await the action of courts or other bodies, the delay might result in public calamity. The

right of self-preservation is one of the first laws of nature, and applies to organized societies as well as individuals."

Baumgartner v. Hasty, 100 Ind. 575, contains the following language:

"A man has no right to build a wooden house in a place prohibited by law, and thus endanger the safety of the person or property of others. He has neither a legal nor a moral right to do an illegal act on his own premises, which puts in jeopardy the person or property of another. There can be no acquisition of a right by the performance of an illegal act. In removing a building erected in violation of law, and in a situation where it imperils person or property, no private right is invaded, because none could grow out of the illegal act."

The following are like quotations from other cases:

"A building erected in violation of an ordinance fixing fire limits may be torn down or removed without any judicial proceeding whatever. Eichenlaub v. City of St. Joseph, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590; Hine v. City of New Haven, 40 Conn. 478; King v. Davenport, 98 Ill. 305; Baumgartner v. Hasty, 100 Ind. 575; Klinger v. Brickel, 117 Pa. St. 328; 11 Atl. 556; McKibbin v. Ft. Smith, 35 Ark. 352. Delays of this character might endanger the public safety, and ought not to be tolerated."

Lemmon v. Guthrie Center, 84 N. W. 986.

"The real question is whether the City had the right to tear down the building without any judicial proceeding against the plaintiff, the owner thereof. We find no real conflict in the authorities upon this question; for it is held in many cases that where a municipal corpora-

tion has the power to prohibit the construction of wooden buildings in a district confined by ordinance, and has enacted an ordinance to that effect, it may remove any building erected in violation of the ordinance, and this, too, without any judicial proceeding whatever." (Citing cases from Ark., Pa., Ill., Ind., and Conn.)

Eickenlaub v. St. Joseph, 21 S. W. 8.

"The question has often arisen in other jurisdictions and, so far as our examination enlightens us, the authority to abate new buildings constructed in violation of existing ordinances, has been affirmed whenever the question has arisen. Not in all cases has the right to abate been rested on the ground that a building not constructed in compliance with the ordinance is a nuisance *per se*, but in some it has been deemed sufficient to say that the building so erected was erected in defiance of law; but, whatever the reasoning adopted, the right has been affirmed." (Citing cases.)

Micks v. Mason, 108 N. W. 707.

To the same effect see also:

Hine v. New Haven, 40 Conn. 478;

McKibbin v. Fort Smith, 35 Ark. 352;

King v. Davenport, 98 Ill. 305;

Klinger v. Bickel, 11 Atl. 555;

Baxter v. Seattle, 28 Pac. 537;

Wadleigh v. Gilman, 12 Me. 403;

Freund on Police Power, p. 560, sec. 528;

McQuillin on Municipal Corporations, Vol. III, p. 2077;

Dillon on Municipal Corporations, 5th Ed., Vol. II, pp. 1106-7;

9 Ann. Cas., p. 292, note;

4 R. C. L., p. 413, sec. 18.

These authorities uniformly announce the rule for which we contend, that a wooden building erected within fire limits may be summarily destroyed by public officers duly authorized thereto. This must be the law, or the only alternative would be that one, who by force or fraud had erected a wooden building within the fire limits, could maintain the building which he had illegally erected in defiance of law and at the imminent peril of neighboring property.

X.

THE CITY IS NOT AND CANNOT BE ESTOPPED TO DESTROY A WOODEN BUILDING WITHIN THE FIRE LIMITS.

A. The police power cannot be bartered away.

Plaintiffs in error claim that the city is estopped to destroy this building. The grounds on which they seek to base this estoppel are not in any case very convincing. However, it is well settled that the exercise of the police power cannot be bartered away, even by express contract; and the power to remove a wooden building erected within fire limits is an exercise of the police power of the first importance since it intimately concerns the safety of persons and property.

So in

Fire Dept. v. Atlas Co., 13 N. E. 329,

the Court of Appeals of New York held that (quoting from syllabus):

"The fire department of New York City, in the enforcement of the provisions of the building laws applicable to the city, is not estopped by the fact that the dock department of New York City made an illegal lease to defendant of the property sought to be subjected to the lawful regulations."

The court said at page 333:

"No department or officer of the city government could enter into a valid stipulation with the defendant by which it would be authorized to violate any law enacted for the public safety."

In

Brooklyn v. Furey, 30 N. Y. S. 349,

the court said:

"The sole question to be considered is whether or not the common council can permit the erection of frame buildings within the fire limits. It seems to me to be very clear that the common council has no such power, and the only reason that the courts have not so held is that the city authorities did not take action, but quietly allowed the law to be violated."

And on page 352:

"The counsel for respondent claims that his client, by reason of the consents obtained and the lapse of time, has vested rights. The difficulty is that he never had any rights to vest. A similar case arose in New York City, where the dock department attempted to lease piers with sheds erected in violation of the fire laws. Judge Earl in that case said (Fire Dept. of New York v. Atlas S. S. Co., 106 N. Y. 566, 577, 13 N. E. 329):

> "The defendant by its lease of the pier from the dock department, was not authorized to violate the building laws applicable to the city. No department or officer of the city government could enter into a valid stipulation with the defendant by which it would be authorized to violate any laws enacted for the public safety."

These cases are directly in point here. They are an application to the question of buildings erected in violation of building regulations of the general principle that the police power of a municipality cannot be bartered away.

This principle has frequently been enunciated by this court. We quote below from a few of the many cases in which this principle has been stated.

> "Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and public morals. The Legislature cannot by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim *salus populi suprema lex:* And they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."
>
> Boston Beer Co. v. Mass., 7 Otto 25, 24 L. Ed. 989, 992.

"The governmental power of self protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury."

New York etc. R. Co. v. Bristol, 151 U. S. 556, 38 L. Ed. 269, 273.

"It has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away."

Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. Ed. 630, 636.

"For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant."

Atlantic etc. R. Co. v. Goldsboro, 232 U. S. 548, 58 L. Ed. 721, 726.

"As the state may not, by any law or contract, surrender or restrict any portion of the sovereignty which it holds in sacred trust for the public weal, so a municipality, as a governmental agency, acting and bound always to act as trustee of the powers delegated to it, may not by contract, license or by law, surrender or restrict any portion of the police power conferred upon it."

28 Cyc., 696

McQuillin in his work on Municipal Corporations says, vol. 1, p. 842:

> "Contracts and ordinances relating to any municipal function which embarrass in any way the power of reguiation of public affairs are *ultra vires;* for the municipal corporation cannot in any manner divest itself of its power to control and regulate at all times everything within the domain of its jurisdiction. The adjudications present numerous instances of ordinances and contracts in derogation to the police powers which are uniformly declared void under this principle. Such powers belong emphatically to that class of objects which demand the application of the maxim *salus populi suprema est lex:* and they are to be attained and provided for by such appropriate means as the discretion of those who officially represent and act for the municipal corporation may devise from time to time. 'The discretion can no more be bargained away than the power itself.' "

Following this rule it was held in

Douglas v. Greenville, 75 S. E. 687,

that the fact that plaintiff had been granted a permit by municipal authorities to erect a stable, and had incurred considerable expense, did not estop the city officials from enforcing an ordinance forbidding a stable in that location. At pages 689, 690 the court said:

> "The facts that petitioner had been granted a permit to build and had incurred considerable expense preparatory to building cannot avail against the ordinance. 'As the state may not, by any law or contract, surrender or restrict any portion of the sovereignty which it holds

> in sacred trust for the public weal, so a municipality, as a governmental agency, acting and bound always to act as trustee of the power delegated to it, may not by contract, license, or by-law, surrender or restrict any portion of the police power conferred upon it.' (Citing cases.)"

In

> Union Cemetery Assn. v. Kansas City, 161 S. W. 261,

the court held that the city was not estopped to enforce an ordinance prohibiting cemeteries within certain limits by the fact that a charter had been issued to the association to maintain a cemetery within those limits. The court said at page 272:

> "This is but the exercise of the police power which neither the city nor state can surrender or bargain away. All the authorities so hold. (Citing cases.)"

In

> State v. Great Northern R. Co., 158 N. W. 972, 974,

the court said:

> "The predecessor of the Great Northern entered into a contract with the city which provided that whenever the city directed that a street be carried over the tracks of the company by a bridge the company should build the abutments for the bridge and the superstructure over its tracks, and that the city should build the approaches thereto and should maintain the bridge and keep it in repair. This contract clearly attempted to take from the city a part of its police power and was unquestionably void. (Citing cases.)"

In

Otis Elevator Co. v. Chicago, 105 N. E. 338,

the court used the following language at page 343:

> "There is a suggestion of an equitable estoppel of the defendant to change the grade of the railroad. The doctrine of equitable estoppel will be applied to a city if justice and right require, as in a case where the assertion of a public right will encourage or permit fraud. * * * In the exercise of the police power the city had a right, within reasonable limits, to require the railroad company to elevate its tracks so as to avoid grade crossings upon streets and protect the lives and property of its citizens. (Citing cases.) That power, like other powers of government, when mere property interests are involved, is subject to constitutional limitations. (Citing cases.) But the power is incapable of alienation, and no valid contract can be made which assumes to alienate or surrender such a power which is required to continue in existence for the welfare of the public. (Citing cases.) *So far as requiring the elevation of the tracks was an exercise of the police power, no equitable estoppel could operate to prevent its exercise.*" (Italics ours.)

In

Shea v. Muncie, 46 N. E. 138,

the court held that the fact that a license to sell liquor had been granted to plaintiff and he had paid a license fee could not estop the city to enforce against him an ordinance forbidding the sale of liquor in the residence district. After discussing the general principles applicable, the court said at page 143:

> "Nor does the payment of the license fee to and retention thereof by the city create an estoppel against the city to enforce the ordinance against selling in the residence portion of the city, as is contended by appellant's counsel, both because of the principles of law above announced, and because the appellant must be held to know the law, and to have known when he sought the permit and when he paid his money that the city could lawfully withdraw the permit at any time, and that the city could not barter away its power to do so. Therefore there is no element of estoppel about it. The facts and circumstances as to the legal effect of the transaction were equally known to both parties. In such a case there can be no estoppel. (Citing cases.)"

In

State v. St. Paul etc. R. Co., 108 N. W. 261,

it is said at page 269:

> "The power of the state to require the defendants to construct the bridge in question, or any other bridge, at streets crossing the right of way, is an exercise of the police power, which can be neither contracted away nor lost by inaction on the part of the public authorities."

Under this well settled rule that public authorities can neither by contract nor estoppel be prevented from the free exercise of the police power it is clear that defendants in error are not and cannot be estopped from enforcing Ordinance No. 4170 (New Series) against this building.

B. The Charter itself provides that fire limits when once fixed can only be changed by extension. This absolutely takes it out of the power of any municipal officer to permit wooden buildings within fire limits once established.

It is said in Howell v. City of Hamburg, 165 Cal. 172, at page 175:

> "The charter of the city and county of San Francisco authorizes the board of supervisors to fix the limits within which wooden buildings or structures shall not be erected or maintained, and provides that 'such limits when once established shall not be changed except by extension'. (Charter, Chap. II, sec. 5.) So that it would seem that the supervisors would have had no authority after the fire, even by ordinance, to permit the erection of any wooden building within the limits, *the charter provision limiting their power in this behalf.*" (Italics ours.)

In Brooklyn v. Furey, cited *supra*, the court, in considering a similar situation, said:

> "When the legislature gave the common council power to enlarge the fire district, I am of opinion that it thereby prohibited that body from doing the opposite. The legislature considered what powers should be given on the subject to the common council, and determined that it might enlarge, but not reduce, the fire district."

The Legislature, by our Charter, has expressly and absolutely prohibited the erection of further wooden buildings within fire limits. It has gone further. It has provided that once fixed, the fire limits can never be reduced. And yet plaintiffs in

error claim that by indirection and inaction the city's officers could do what they are expressly forbidden to do—permit the erection of wooden buildings within the fire limits. If this contention is correct then the prohibition of the Charter can be nullified, simply by the supervisors and other city officers allowing wooden buildings to be built within fire limits. In other words by permitting the law to be broken, which it is their express duty to enforce, they and their successors will be estopped thereafter to enforce the law against those who have broken it. And this in the very face of the fact that the Charter framers have shown very emphatically how important they considered the enforcement of the fire limits, by making it impossible for the supervisors ever to reduce them, no matter how imperatively necessary such a reduction might seem to be.

We submit that on the face of it this proposition cannot be true.

XI.

PLAINTIFFS IN ERROR ARE NOT ENTITLED TO ANY RELIEF IN EQUITY BECAUSE THEY DO NOT COME INTO COURT WITH CLEAN HANDS.

Plaintiffs in error are not in any position to attack Ordinance No. 4170 (New Series) for the reason that having erected a wooden building in violation of law and continued in violation of law to maintain it to the present time they cannot seek the aid of a court of equity to maintain it.

"No one can take advantage of his own wrong."

California Civil Code, section 3517.

"In accordance with a favorite maxim of equity jurisprudence, that he who applies for equity must also have done it, a party applying for an injunction must come into equity with clean hands and a clear conscience."

Joyce on Inj., vol. 1, p. 30, sec. 14;

14 R. C. L., sec. 56, p. 353;

Pomeroy, Eq. Jurisp., 3d Ed., vol. 1, sec. 397, p. 657;

Spelling, Inj. & Ex. Rem., 2d Ed., vol. 1, sec. 28, p. 40;

10 Enc. Pl. & Pr., p. 932;

Pittsburg etc. Co. v. Crothersville, 64 N. E. 914;

Rudolph v. Golden & Co., 39 App. Cas. (D. C.) 230;

Daneiger v. Stone, 187 Fed. 853;

Board v. O'Dell etc. Co., 115 Fed. 574;

Fairfield etc. Co. v. Bradbury, 89 Fed. 393;

Sweeney v. Wilkes-Barre, 62 Pa. Supr. Ct. 54.

This is the rule in California.

"If billboards * * * constitute a public nuisance a court of equity will refuse any relief designated to perpetuate their maintenance, regardless of the validity of the ordinance."

Varney & Green v. Williams, 155 Cal. 318.

"A person who comes into a court of equity for an injunction in a case of this kind must

come with clean hands; he cannot be granted relief upon a claim to the exclusive use of a trade-mark which contains a false representation calculated to deceive the public as to the manufacture of the article and the place where it is manufactured."

Joseph v. Macowsky, 96 Cal. 518;

Millbrae Co. v. Taylor, 37 P. 236;

Castroville etc. Co. v. Col., 6 Cal. App. 533;

Pac. Debenture Co. v. Caldwell, 147 Cal. 106.

The plaintiffs in error having erected and maintained a building in violation of law do not come into court with clean hands. Regardless of the validity of Ordinance No. 4170 (N. S.) equity will not aid them to maintain a building in violation of the law.

For the foregoing reasons we respectfully submit that the judgment in this case is correct and should be affirmed.

Dated, San Francisco,
January 10, 1921.

Respectfully submitted,

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